

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration as untimely and insufficient to show clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In decisions dated September 30, 1992, September 1, 1994, January 26, 1999 and June 1, 2001, the Board affirmed OWCP decisions finding that appellant had no disability after June 30, 1999 causally related to his June 8, 1987 employment injury.³ By decision dated July 5, 2012, the Board affirmed a July 26, 2010 nonmerit decision denying his request for reconsideration under 5 U.S.C. § 8128 and November 4 and 30, 2010 nonmerit decisions denying his requests for reconsideration as untimely and insufficient to establish clear evidence of error.⁴ The Board found that OWCP relied upon the opinion of appellant's attending physician, Dr. Rodger K. Garrett, who specializes in pain management, to terminate his compensation for refusing suitable work. Dr. Garrett reviewed edited surveillance video from the employing establishment showing him playing an organ and piano during three church services, sitting for extended periods and walking without apparent discomfort. He determined that appellant could perform the position offered by the employing establishment on April 30, 2009. The Board considered appellant's argument on reconsideration that Dr. Garrett was not his attending physician and that the surveillance tape was not valid. The Board found, however, that he had not raised an argument or submitted evidence to OWCP sufficient to warrant reopening the case for further merit review under section 8128. The Board further considered appellant's contention that Dr. Garrett testified in civil court that he saw appellant moving a piano bench on the surveillance tape but did not mention him moving a piano bench in his medical report. It found that "even if Dr. Garrett did not witness appellant move a piano bench, this alone would not constitute clear evidence of error by OWCP...." The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

On July 19, 2012 appellant requested reconsideration. He described Dr. Garrett's testimony in civil court in October 2010 that he was observed moving a piano bench on the surveillance video. Dr. Garrett agreed with the dissenting opinion in the Board's July 5, 2012 decision.

In a decision dated August 20, 2012, OWCP denied appellant's request for reconsideration after finding that it was not timely and did not demonstrate clear evidence of error.

³ Docket No. 92-249 (issued September 30, 1992); Docket No. 93-2409 (issued September 1, 1994); Docket No. 97-2508 (issued January 26, 1999) and Docket No. 01-241 (issued June 1, 2011). OWCP accepted that on June 8, 1987 appellant, then a 31-year-old manual clerk, sustained an aggravation of right inguinal hernia surgery and peripheral ilioinguinal and iliohypogastric nerve entrapment.

⁴ Docket No. 11-627 (issued July 5, 2012) (Haynes, Alternate Member, dissenting).

On November 19, 2012 appellant again requested reconsideration based on a November 2012 statement from the state's attorney office. He asserted that the statement established that Dr. Garrett's opinion was not credible as he testified that he witnessed appellant moving a piano bench when the videotape evidence did not show such an action.

In a statement dated November 16, 2012, Gregory A. Marcille, Chief Assistant State Attorney, informed appellant that there was insufficient evidence to charge Dr. Garrett with perjury. He stated:

"As part of our review, we have examined the court file as well as a video tape that was contained in the file. In the Final Judgment, Judge Kinsey wrote that Dr. Garrett viewed a video tape and that he observed [appellant] lift and move a piano bench without any apparent pain or discomfort. An investigator with our office has viewed the video tape that was filed with the court. While that tape was of poor quality, it appears to depict [appellant] moving around and playing the piano. At no time could we see [appellant] moving or lifting a piano bench. This is the only tape that was viewed and we are unaware of any other video tapes."

By decision dated December 11, 2012, OWCP denied appellant's untimely request for reconsideration as it failed to show clear evidence of error.

On December 13, 2012 appellant again requested reconsideration. He asserted that an official with OWCP told him that he would prevail if he provided a statement from the state's attorney's office indicating that he did not pick up a piano at church. Appellant resubmitted the November 16, 2012 letter from Mr. Marcille.

In a decision dated January 28, 2013, OWCP denied appellant's request for reconsideration as it was untimely and did not show clear evidence of error. It found that the evidence submitted was insufficient to establish clear evidence of error and noted that the issue was whether he could perform the offered position.

On appeal, appellant argues that the evidence shows that Dr. Garrett made false statements about him moving a piano bench and that the poor quality of the tape fails to support that Dr. Garrett witnessed him playing the piano for an extended period.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁵ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. OWCP will consider an untimely application only

⁵ 5 U.S.C. § 8101 *et seq.*

if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

The term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on OWCP’s Director’s own motion.⁷ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.⁸

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP.⁹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁰ As appellant’s July 19, November 19 and December 13, 2012 requests for reconsideration were submitted more than one year after the last merit decision of record, they were untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹¹

In his July 19, 2012 request for reconsideration, appellant asserted that Dr. Garrett erroneously testified that he witnessed him moving a piano bench. OWCP and the Board, however, previously considered this argument and found that it was insufficient to show clear evidence of error.

In requests for reconsideration dated November 19 and December 13, 2012, appellant argued that a statement from Mr. Marcille with the state attorney’s office established that Dr. Garrett was not credible. He submitted a November 16, 2012 statement from Mr. Marcille, who related that a judge wrote that Dr. Garrett watched a surveillance video and witnessed appellant moving a piano bench with no evidence of pain. Mr. Marcille asserted that an investigator in his office reviewed the videotape, which was of poor quality. The tape showed appellant playing the piano but not lifting or moving a piano bench. In the Board’s prior decision dated July 5, 2012, however, it specifically found that even if the evidence established Dr. Garrett did not see appellant move a piano bench, this would not constitute clear evidence of

⁶ 20 C.F.R. § 10.607.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

⁸ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Robert F. Stone*, *supra* note 8.

¹¹ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

error by OWCP in terminating his compensation. The Board determined that such evidence would not manifest on its face error by OWCP in terminating his compensation for refusing suitable work. Consequently, Mr. Marcille's statement is insufficient to show clear evidence of error.

On appeal, appellant asserts that the statement from Mr. Marcille shows that Dr. Garrett was not credible and that the tape was of too poor of quality to be relied upon. The term "clear evidence of error," however, is intended to represent a difficult standard. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.¹² The evidence submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that OWCP, in its August 20, December 11, 2012 and January 28, 2013 decisions properly denied appellant's requests for reconsideration as untimely and insufficient to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2013, December 11 and August 20, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 11, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹² See *Veletta C. Coleman*, 48 ECAB 367 (1997).